SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 283

BOARD OF LEVEE COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT,
Plaintiff-Appellee

vs.

GEORGE B. FRANKLIN, SR., AND GEORGE B. FRANKLIN, JR.,
Defendants-Appellants

MOTION TO DISMISS THE APPEAL

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Now into this Honorable Court, through undersigned Counsel, comes the Board of Levee Commissioners of the Tensas Basin Levee District, State of Louisiana, Appellee in the above entitled cause and with respect shows the Court:

I

That any appeal sought to be made to this Honorable Court in this cause is without foundation in law or in fact

in view of the absence and lack of any Federal question for this Court to consider or determine and this Court is therefore without jurisdiction to entertain an appeal in this cause.

II

That Appellants herein seek an appeal of this cause to this Honorable Court on the grounds that the judgment of the Supreme Court of Louisiana maintaining a permanent injunction against said Appellants is in violation of the Fourteenth Amendment to the Constitution of the United States in that Act 61 of the Louisiana Legislature of 1904, Article 665 of the Louisiana Revised Civil Code of 1870 and Article 16, Section 6 of the Louisiana Constitution of 1921 are all in violation of said Fourteenth Amendment to the Constitution of the United States. The appropriate portions of those laws provide respectively as follows:

ACT 61 OF 1904

"The various Levee and Drainage Districts of this State shall have control over all public Drainage Channels within the limits of their respective Districts and for a space of 100 feet on each side thereof, selected by the District and recommended and approved by the Board of State Engineers * * *"

ARTICLE 665 OF THE LOUISIANA REVISED CIVIL CODE OF 1870

"Servitudes imposed for the public or common utility, relates to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works."

"All that relates to this kind of servitude is determined by laws or particular regulations."

ARTICLE 16, SECTION 6 OF THE LOUISIANA CONSTITUTION OF 1921

"Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, * * * shall be paid for at a price not to exceed the assessed value for the preceding year; * * * This shall not prevent the appropriation of said property before payment."

Appellants specially pleaded the alleged unconstitutionality of the aforementioned Act 61 of 1904 and Article 665 of the Louisiana Revised Civil Code of 1870 with respect to both the State and Federal Constitutions but the record fails to disclose that said Appellants ever pleaded the incompatibility of the Fourteenth Amendment and Article 16, Section 6 of the Louisiana Constitution even though such plea could have been filed in the Supreme Court of Louisiana while the case was being considered by that Court. Having failed to make such special plea in the State Court we submit that Appellants may not now be heard to urge that plea in this Court for the first time.

Even if it be conceded for the purpose of argument, and it surely is not conceded for any other purpose, that Article 665 of the Revised Civil Code and Act 61 of 1904, as applied by the Supreme Court of Louisiana, both violate the Fourteenth Amendment of the Constitution of the United States, that still would not vest jurisdiction in this Court in this cause.

Both Article 665 and Act 61 of 1904 were cited in support of the State Court's judgment but the most compelling authority cited was Article 16, Section 6 of the Louisiana Constitution of 1921 about which Appellants have made no previous plea of unconstitutionality although the original complaint or petition filed in the Court of original jurisdiction made special reference to this Constitutional provision.

Article 16 of the original petition or complaint invoked the provisions of Article 16, Section 6 of the Louisiana Constitution of 1921 in support of the Levee Board's application for injunction at the outset of this litigation when the petition alleged:

> "That in addition to the servitude that your petitioner has over lands necessary for the construction and maintenance of levees and levee drainage under Article 665 of the Civil Code and Article 16, Section 6 of the Constitution of 1921 your petitioner, as well as all levee Boards in the State of Louisiana, has control over all natural drainage channels within the limits of its district and for a space of One Hundred (100) feet on each side thereof."

Reference to Article 31 of Appellants' answer to the original complaint or petition will readily disclose that special pleas were made with regard to Article 665 of the Revised Civil Code and Act 61 of the Louisiana Legislature of 1904 but no plea was made with respect to the provisions of Article 16, Section 6 of the Louisiana Constitution of 1921. The aforementioned Article 31 of Appellants' answer reads as follows:

> "Respondents aver that if Article 665, Revised Civil Code of Louisiana, or Act 61 of 1904, are interpreted to permit or held to authorize the "appropriation" attempted by petitioner, which is denied, then that said Act and said Codal provision violate the particular provision of the Constitution of the State of Louisiana and of the United States of America next above set out."

This in what the Louisiana Supreme Court had to say about the scope of Article 16, Section 6 of the Louisiana Constitution of 1921.

> "The defendants contend that the plaintiff has no authority in law to appropriate the property involved

in this suit. They take the position that the plaintiff can only obtain this property through expropriation proceedings. Their contention is based on their argument that Article 665, Revised Civil Code, and Section 6 of Article 16 of the Constitution do not grant the plaintiff authority to appropriate property not situated on navigable streams. They say that an interpretation of this Constitutional provision, when construed with a provision of a prior Constitution, Article 312 of the Constitution of 1898, demonstrates that this provision of the present Constitution deals only with the right of compensation. It is further argued that this provision of our Constitution does not extend the servitude granted under Article 665, R. C. C. to property not situated along navigable streams. To support their contention that the right of appropriation is governed by Article 665, R. C. C., they cite Dickson v. Board of Commissioners, supra. We have carefully examined the opinion in that case and find that it reviews the history of this article of the Civil Code and laws enacted to protect our state from flood waters. In view of the fact that the drainage of most of the Mississippi Valley flows through this State and the further fact that our state has many streams and natural drains, flood control is very vital to our welfare. Our lawmakers have been enacting, from time to time progressive measures to prevent and to minimize the damage caused by flood waters. Article 665, R. C. C. has been interpreted to apply not only to property actually adjoining the river edge but to all of that which is within range of the reasonable necessity of the situation as produced by the forces of nature unaided by artificial causes. Wolfe v. Hurley, 46 F. 2d 515, affirmed 283 U. S. 801, 75 L. Ed. 1423, 51 S. Ct. 493. While the issue presented in this case is different from that presented in the case of Dickson v. Board of Commissioners, supra, the reasons given for the decision and the statements made therein support the construction placed on this article of the Code by the federal court. A construction of this codal article so as to apply only to the

shores of navigable streams would be too narrow and defeat the purpose sought to be obtained. It would be useless to build a levee if it could not be protected. But be that as it may, when the codal article is construed with Act 61 of 1904 and Act 66 of 1942, it is apparent that the plaintiff had ample authority to appropriate this property. *Moreover, if there were any doubt as to the authority of the plaintiff to appropriate this land under the codal article and statutes, the plaintiff had ample authority under Section 6, Article 16 of the Constitution of this state which authorizes the appropriation of property used or destroyed for levee drainage purposes. What is necessary for levee drainage purposes is a question of fact and, as pointed out above, Levee Boards have the responsibility of providing sufficient levees and levee drainage to relieve the state from the hazards of flood waters.*" (Emphasis ours.)

Regardless, therefore, of what may be the case with respect to the statutory and codal provisions the Louisiana Courts would surely have reached the same result on the basis of the Constitutional provision alone. Inasmuch as no plea was ever made by the Appellants that the Constitutional provision is violative of the Fourteenth Amendment to the Constitution of the United States Appellants may not now be heard to invoke the jurisdiction of this Court for that purpose nor to urge that this Court rule on the statutory and codal provisions when such ruling would not alter the existing judgment in this cause.

We take it as too well settled to admit of argument or require citation that unconstitutionality is a special plea and cannot be raised in this Court for the first time, thus denying the Supreme Court of Louisiana the opportunity to have ruled on the point. We take it too that this Court requires no citation or authority for the proposition that jurisdiction will not be noted unless opportunity is afforded

to alter the judgment after consideration of a federal question. No federal question decisive of the affect of the existing judgment is presented by this appeal and it is submitted that same should be dismissed.

III

Appellants seek to invoke the jurisdiction of this Court on the basis that the final judgment of the Louisiana Supreme Court constitutes a taking of property without due process of law. Your Honors are reminded that this entire proceeding involved only an application for preliminary and permanent injunctions and at no time was the ownership of any property at issue in the litigation. It will be noted from the original petition or complaint of the Tensas Basin Levee Board that the injunctions were sought without regard to the ownership of property affected and surely the judgments rendered by both the trial Judge and the Supreme Court of Louisiana amply demonstrate that the right of the Levee Board to enjoin the practices of Appellants here was wholly without regard as to whether Appellants are the owners of any property. The Levee Board did not know then and does not know now in whom the ownership of the affected property is vested; the Levee Board does not care in whom the ownership may be vested. The position of the Levee Board, fully confirmed by the opinion and judgment of the Supreme Court of Louisiana, to put it simply, is that these Appellants were enjoined from the threatened use of arms against a contractor of the United States and this regardless of whether defendants or other parties may be the true owners of the land affected.

Inasmuch as Appellants seek this appeal solely on the basis that property is being taken without due process of law, we earnestly submit that Appellants have not shown

in the record that they are the owners of the property affected. Furthermore the record fails to disclose that any property is being taken with or without due process of law. The content of the judgment of injunction fails to recognize any ownership of any property; it simply enjoins Appellants from the threatened use of arms.

In view of the failure of the record to show and of the Louisiana Courts to find that Appellants are the owners of any property affected by the injunction, it is submitted that no question of the taking of property with or without due process of law has been or may now become involved in this litigation and that no federal question under the Fourteenth Amendment to the Constitution of the United States, exists in this cause.

IV

With respect to Act 61 of the Louisiana Legislature of 1904 we should like to correct any impression that the power conferred by that Statute is in any way related to eminent domain or expropriation. The exercise of the power granted by the Statute is in no way confiscatory, does not disturb nor change the ownership of the land, but simply provides for a reasonable exercise of the police power of the State, delegated by law to a political subdivision of the State. For this further reason it is urged that no federal question is involved in this cause.

WHEREFORE, the Board of Levee Commissioners of the Tensas Basin Levee District, Appellees herein, respectfully move that the appeal sought to be made by Appellants, George B. Franklin, Sr., et al. be dismissed for lack of a federal question vesting this Court with jurisdiction of this cause.

Appellees further pray for all orders necessary and for general and equitable relief.

(S.) C. C. Wood,
Attorney for Board of Levee Commissioners of the Tensas Basin Levee District, State of Louisiana,
P. O. Box 4155, Capitol Station,
Baton Rouge, Louisiana.